SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S OBJECTION TO THE MOTION OF NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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For the following reasons, respondent withholds its consent and objects to the motion of National Community Television Association (hereinafter, NCTA) for leave to file a brief *amicus curiae* in support of the petition herein for a writ of certiorari:

1. The 56-page petition herein for a writ of certiorari was duly filed September 15, 1967.[1] Accordingly, it

[1] Respondent's time to file its brief in opposition to the petition has been extended to November 3, 1967, by the Clerk, on consent.

was fully available to NCTA for a month before this motion was filed on October 16, 1967, and NCTA knows, or should know exactly what arguments petitioner has made. Moreover, E. Stratford Smith, Esq., one of petitioner's attorneys in both Courts below, and one of its attorneys on the petition herein for a writ of certiorari, was introduced on August 2, 1966, at a hearing on a copyright revision bill, to the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee by NCTA's president as "the special counsel to the National Community Television Association". *Hearings on S. 1006,* August 2, 3, 4, and 25, 1966, 89th Cong. 2d Sess., at page 84. In these circumstances, NCTA's "belief", Par. 5, p. 2, that "the parties", presumably, petitioner, "not representing the broad industry view, *will* present arguments more narrowly aimed at the effects of the ruling on the parties herein * * * " is curiously and unconvincingly prospective. An examination of the petition will confirm that NCTA's "special counsel", doubling as an attorney for petitioner, did not overlook the "broad industry" viewpoint, as NCTA would suggest.[2] Moreover, NCTA does not specify in what respects, if any, petitioner's arguments are "narrowly aimed", and, indeed, it could not. The petitioner has made vivid the view, which NCTA proposes to present, Par. 5, p. 2, that this case "will affect an entire industry", with emphasis *in extenso* on "the severe

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[2] It may be noted, also, that a "Legal Memorandum of the NCTA in Rebuttal to the Statement of Louis Nizer Before Subcommittee No. 3 of the House Judiciary Committee" is signed "E. Stratford Smith, Special Counsel to the National Community Television Association". *Hearings on H.R. 4347, etc., Bills for the General Revision of the Copyright Law,* Subcommittee No. 3, H.R. Judiciary Committee, 89th Cong., 1st Sess., 1965, Part 2, pp. 1307-1312.

impact of the decision on that industry". While its assertion is that it "wishes to inform the Court of the CATV industry's viewpoint", Par. 5, p. 2, NCTA nowhere discloses in what respects, if any, the "CATV industry's viewpoint" differs from that already expressed by the petitioner.

2. The "informational perspective" which NCTA claims as "peculiarly" its, Par. 3, p. 2, and that it possibly "reflects", as it says it does, "a source of information", p. 4, are wholly irrelevant to the role it seeks to play in this proceeding unless, upon the consideration of the petition herein for a writ of certiorari, this Court is to receive *ex parte* evidence. In any event, NCTA does not point to what, if any, relevant facts or "information", not already presented by petitioner, or not included in the gargantuan record in this case, it would supply. The record, to the extent included in the Joint Appendix in the Court below, which has been filed with this Court, comprises 1,342 printed pages, and 435 printed pages of exhibits. The trial took 19 days. Certainly, in any event, it would not be too much to assume that whatever information is available to NCTA was equally available to E. Stratford Smith, Esq., its "special counsel", who has been one of petitioner's attorneys throughout the litigation, and appears as one of its attorneys on the petition herein.

3. It is not clear whether the considerations put forward by NCTA in its "Argument" in support of this motion, pp. 5-11, are the considerations it would urge if this motion were granted. However, if they are, NCTA's participation as *amicus curiae* would demonstrably add nothing, for each and every of the considerations it advances has been fully dealt with,

at length, in the petition,[3] except, perhaps, NCTA's "information" concerning the "typical" or "average" CATV system and its operator, pp. 7-9, which is patently irrelevant. For, whether the "typical" or "average" CATV system is located in a small town or a large one, whether it employs three people or 30, or whether its "subscribers" number 1,350 or 13,500, or any similar "information" has, and can have no bearing whatsoever on whether the Court below "has decided an important question of federal law which has not been, but should be settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court", which are, essentially, the criteria governing the disposition of the petition by this Court. Rule 19, Par. 1(b).

Substantively, too, such "information" is wholly irrelevant. For, it sheds no light on the scope and extent of the "exclusive right" of a copyright owner to "perform" his copyrighted works "publicly" or "in public", within the meaning of sections 1(c) and 1(d) of the Copyright Act, nor does it help to determine whether "in simply distributing television signals received off-the-air to its subscribers",[4] p. 7, a CATV system "performs" copyrighted works being transmitted by such signals, "publicly" or "in public", within the meaning of sections 1(c) and 1(d) of the

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[3] See, e.g., pp. 6 and 9 of the brief in support of the motion, which parallel p. 24 of the petition; pp. 7 and 8, which echo p. 25 of the petition; and p. 10, which simply summarizes the arguments at pp. 26-28, 38, 42 and 53-56 of the petition.

[4] A CATV system, however, is by no means "simply a master TV antenna". *Second Report and Order*, 2 FCC 2d 725, 780 (1966). The complex and sophisticated equipment and processes employed by petitioner are described in detail by the District Court, 255 F. Supp. 177, 187, 188, 190-197; and are summarized by the Court of Appeals, Petition, App., p. 6, 377 F.2d 872, 875, 876.

Copyright Act. NCTA's "information" concerning the "typical" or "average" CATV system clearly has no relevancy to whether there are "policies" of the Copyright Act, or antitrust considerations, or "policies" of, or regulatory action under the Federal Communications Act, which support petitioner's broad contention that it has no copyright liability either because it does not "perform" broadcast copyrighted works, or perform them "publicly" or "in public", when it retransmits them, or because it has a license implied-in-law to do so.

The substantive points made by NCTA in support of its motion are the same as those urged by petitioner. Accordingly, respondent reserves its answers thereto for its brief in opposition to the petition.

For all of the reasons hereinabove set forth, and because NCTA has not set forth any "facts or questions of law that have not been presented" by the petitioner, except "facts" that are manifestly irrelevant, the motion, which is "not favored," should be denied. Rule 42, Pars. 1, 3.

Respectfully submitted,

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